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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALLEN W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

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To the Honorable Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

We desire to amplify the petitioner's statement of facts in the following particulars:

The money paid by the claimant was never carried on the books of the Trust Department of the bankrupt, but was carried on its general ledger account (p. 71 Rec.). The funds were placed in the general bank account, and never thereafter segregated nor transferred to the trust account (p. 73 Rec.).

The lowest general account balance on hand by the bankrupt after the City's funds were received and prior to the adjudication in bankruptcy was on July 8, 1932, being the day preceding the adjudication, and was in the sum of $628.63 in the bank account, and purported cash items of $1,599.00, which later sum included $599.00 (pp. 72 and 81 Rec.) in cashier's cage, and the rest consisted of checks and debit tickets, including a debit ticket in the sum of $1,000.00 to be charged to the expense account. This was not in fact cash, and there is nothing to show that it was ever afterwards collected as cash, and no showing that it was ever a part of the bank account.

The general bank account fluctuated from day to day, and deposits varied from five to fifty thousand dollars (p. 81 Rec.).

The bankrupt also received funds for which it issued receipts to various persons, which accounts were known as "Modern Investments" (pp. 73, 74 Rec.; Exhibit 2, p. 74 Rec.). These were in effect installment contracts for the purchase of real estate mortgage bonds. The largest amount in this account was on September 25, 1928, at which time it amounted to $114,418.00, and there was less after September 26, 1928. The account fluctuated in the amount of $600.00 between September 26th and October 1, 1928. The lowest amount of such liabilities in this account prior to bankruptcy was on June 28, 1932, when

they amounted to $28,592.05. The money in these accounts was also carried in the general bank account of the bankrupt.

The bankrupt also received funds under agreements known as Eltelic contracts (Exhibit 3, p. 75 Rec.). These were in effect agreements by which the holder was to make monthly payments to the bankrupt, and the bankrupt agreed to pay insurance premiums due from the holders of the contracts. On September 26, 1928 (date of City's deposit), there was approximately $36,516.76 to the credit of holders of these contracts (p. 78 Rec.). The lowest amount of liabilities thereon was $18,910.25 on June 28, 1932. This money was also kept in the general bank account and was never transferred to the Trust Department and the amounts on both this account and the modern investment account fluctuated from month to month.

The bankrupt also had so-called investment accounts for which common receipts were issued with the agreement to purchase securities for the holders of the receipts (p. 78 Rec.). The highest amount in this account was $95,484.32 on August 24, 1931, and it also fluctuated from month to month. The lowest amount was on June 28, 1932, when it was $65,048.91. This money was also kept in the general account of the trust company, in which the company also kept all its own money and out of it paid expenses, costs of operation and other items.

Other items which were deposited in the general account of the bankrupt consisted of principal and interest payments due to bondholders in mortgages and paid in by the mortgagors, payments on collateral and commission notes, safe deposit box rentals, insurance premiums and

other such items (p. 79 Rec.). None of these funds were in any way related to the funds segregated in the separate Trust Department bank account.

The segregated account set up by the bankrupt on June 15, 1932, was of funds received by the bankrupt after April 7, 1932, by way of payments of principal and interest due from mortgagors to bondholders, and which had not been disbursed by the company, and also payments made on Eltelic accounts during that period (p. 82 Rec.).

By stipulation (p. 83 Rec.) it is shown that the Standard Accident Insurance Company paid the City $45,276.81, and City's claim was assigned to the insurance company. It is further stipulated that the said City of Lincoln is a municipal corporation governed under a Home Rule Charter.

On page 6 of their statement petitioners refer to the securities deposited with the Department of Trade and Commerce under Section 8-209 Compiled Statutes Nebr. 1929. Section 8-212 Compiled Statutes Nebr. 1929, in force at the time of the adjudication in bankruptcy, provides for the liability of this fund, and is as follows:

> "The fund deposited as provided in Section 9 (8-209) shall be primarily liable for obligations of such company as guardian, curator, executor, administrator, assignee, receiver, trustee, either by appointment of court or under will, and for depository of money in court, and shall not be liable for any other debt or obligation of the corporation until all other trust liabilities aforesaid have been discharged."

The amended claim (p. 10 Rec.) is based on a contractual trust liability. There is no allegation of a trust ex maleficio or any allegation of, or prayer for, priority of payment under Section 64b (7) of the Bankruptcy Act.

ARGUMENT.

The petitioners give four propositions as reasons on which they rely for issue of a writ of certiorari, followed by argument in the same sequence, which we desire briefly to answer.

I.

A Municipality is Not Given Priority By Section 64b (7) of the Bankruptcy Act.

Petitioners' first proposition is that the Circuit Court of Appeals decided an important question of federal law in construing Section 64b (7) of the Bankruptcy Act and that the question decided has never been directly passed upon by this court.

In their argument on page 13 it is asserted that the construction placed upon the section of the Act was erroneous, which seems to be the only ground, with reference to the first proposition, on which the writ is asked.

If no error appears in the decision of the Circuit Court of Appeals and it is not in conflict with other decisions, then it would seem to be axiomatic that the writ will not be granted. This leads to a discussion of the merits, to which petitioners devote a considerable portion of their argument.

The construction placed upon the section of the Act by the Circuit Court of Appeals is in conformity with other provisions thereof, and with constructions thereof by the courts.

Fundamentally, the Bankruptcy Act contemplates an equal distribution of assets amongst creditors.

International Bank v. *Sherman,* 101 U. S. 403, 24 L. ed. 866.

Wood v. *A. Wilbert's Sons,* 226 U. S. 384, 57 L. ed. 264.

Boese v. *King,* 108 U. S. 379, 27 L. ed. 760.

Cunningham v. *Brown,* 265 U. S. 1, 68 L. ed. 873.

Section 64 of the Bankruptcy Act is clearly an exception to the general intent of the Act as a whole, and will therefore be strictly construed. Priority in payment to any creditor or class of creditors will not be granted unless expressly given by the Act. The Circuit Court has properly applied the principles announced in *Davis* v. *Pringle,* 268 U. S. 315. This court therein passed on Section 64 of the Bankruptcy Act prior to the amendment of 1926, which amendment was passed partly to overcome the holding of the court in finding that the word "person" did not include the United States. The amendment changed the Act to read that the term "person" should include corporations, the United States, and the several states and territories. Congress therefore placed their own interpretation upon the word "person", and did not include therein municipal corporations or other political subdivisions of the government. As they were not specified, it must be concluded that no priority was intended.

Whether the word "corporation" as used in a statute includes a municipal corporation is a question that has been passed upon on numerous occasions by different courts. This court in *County of Sherman in the State of Nebraska* v. *Simonds,* 109 U. S. 735, holds that the word "corporation" does not include a county. Other cases supporting the rule are:

City of Dallas v. *Halford, et al,* (Tex. Civ. App.) 210 S. W. 725.

Carrollton Furniture Mfg. Co. v. *Carrollton,* 104 Ky. 525, 47 S. W. 439.

Donahue v. *Newberryport,* 211 Mass. 561, 98 N. E. 1081.

People v. *Rinaker,* 252 Ill. 266, 96 N. E. 987.

City of Cloquet v. *N. W. State Bank,* 172 Minn. 324, 215 N. W. 174.

Monroe Water Works v. *Monroe,* 135 Wash. 355, 237 Pac. 996.

Osborn County v. *Osborn,* 104 Kan. 671, 180 Pac. 233.

Atlanta v. *Smith,* 99 Ga. 462, 27 S. E. 696.

Rosenstock v. *N. Y.,* 91 N. Y. Supp. 737.

There are many cases holding that the word "person" does not include a municipality or political subdivision. Among them are:

McBride v. *Pierce County,* 44 Fed. 17.

Lowenstein v. *Evans,* 69 Fed. 908.

Scott v. *Frazier,* 258 Fed. 669.

In *Moscow Hardware Co.* v. *Colson,* 158 Fed. 199, the court in deciding whether the general word "corporation" included a political subdivision of the state in a garnishment statute quotes the following language with approval:

> "Yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations or bodies politic and corporate. The words used in the statute of this state are 'persons' or 'corporations' in general terms."

In *State of Florida* v. *Peninsular Telephone Company,* 73 Fla. 913, 75 So. 201, the court construes a statute which prohibits a reduction in telephone rates "to any person or corporation" and also forbids "any undue or unreasonable preference or advantage to any person, cor-

poration, or locality." The court says: "A city or county, being governmental as well as corporate, is in its governmental capacity not a 'person or corporation' within the meaning and intent of the above provision of the statute."

The construction of the section is also consistent and in conformity with other provisions of the Act. Section 1 (6) defines corporations and is not broad enough, under the most liberal construction, to include a municipality. States are defined in Section 1 (24) which does not include municipalities.

Section 64a with reference to priority for taxes states:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality * * *."

It is seen that when Congress intended a municipality to have a priority for taxes it so specifically stated.

The construction of the section of the Act by Judge Gardner of the Circuit Court of Appeals in his opinion (p. 123 Rec.) and likewise his interpretation of the case of *Davis* v. *Pringle*, 268 U. S. 315, and the case of *Guarantee Title and Trust Co.* v. *Title Guaranty and Surety Co.*, 224 U. S. 152, is so clear and concise that further exposition of those cases is deemed unnecessary.

The decision on this proposition is also right on other grounds and reasons which were presented, but which the court did not deem it necessary to pass upon in the view they took of the case. We desire briefly to present the same.

The argument of petitioner is based upon the theory of the common law prerogative right of a sovereign to pri-

ority, in payment of its debt, and that such right is in force in the State of Nebraska by reason of a statute which, to a limited extent, adopts the common law of England and on the further theory that if the right exists in the State of Nebraska it also exists in the political subdivisions of the state, including a municipality.

Our first answer to this is that even were it conceded that the right existed in the State of Nebraska and was applicable under the Bankruptcy Act, even then it has no application to a municipality, as the right belongs to the state or sovereign itself, and cannot be delegated. An examination of the authorities shows that over a score of states have denied the right to political subdivisions, in many cases wherein the state itself was held to have such right. Cases so holding are as follows:

Hammons v. *U. S. F. & G. Co.*, 30 Ariz. 480, 248 Pac. 1086.

U. S. F. & G. Co. v. *McFerson*, 78 Colo. 338, 241 Pac. 728.

Lake Worth Inlet Dist. v. *First American Bank*, 97 Fla. 174, 120 So. 316.

Glynn County v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604.

People v. *Home State Bank of Grant Park*, 338 Ill. 179, 170 N. E. 205.

Leach v. *Castana Savings Bank*, 201 Ia. 346, 207 N. W. 331.

Phillips v. *Yates Center National Bank*, 98 Kan. 383, 158 Pac. 23.

Farmers Bank v. *Bailey*, 221 Ky. 55, 297 S. W. 938.

Bignell v. *Cummins*, 69 Mont. 294, 222 Pac. 797.

Boone County v. *Cantley*, 330 Mo. 911, 51 S. W. (2d) 56.

County Com'rs. of Frederick Co. v. *Page,* 163 Md. 619, 164 Atl. 182.

In re Northern Bank, 148 N. Y. Supp. 70, 163 App. Div. 974, 212 N. Y. 608, 106 N. E. 749.

Cherry v. *Territory,* 17 Okla. 221, 89 Pac. 192.

City of Sturgis v. *Meade County Bank,* 38 S. D. 317, 161 N. W. 327.

U. S. F. & G. v. *Rainey,* 120 Tenn. 357, 113 S. W. 397.

Denson v. *Shaw,* (Texas) 62 S. W. (2d) 344.

San Miguel County v. *Peoples Bank,* 34 N. M. 166, 279 Pac. 60.

Re Valley Deposit Co., 311 Pac. 495, 167 Atl. 42.

U. S. F. & G. Co. v. *Carter,* (Va.) 170 S. E. 764.

Calhoun County Court v. *Mathews,* 99 W. Va. 483, 129 S. E. 399.

In re Waller, 142 Fed. 883 (Md., in Bankruptcy Proceedings).

Fidelity & Deposit Co. v. *Brucker,* (Ind.) 183 N. E. 668, 90 A. L. R. 167.

Petitioners cite one case which they contend is inconsistent with the above statement, that being the case of *City of Denver* v. *Stenger,* decided by the Circuit Court of the Eighth Circuit, and reported in 295 Fed. 809. As stated by Judge Gardner in his opinion in the instant case, that was a receivership, in a state court where the common law prevailed without statutory modification, and where the state court had therefore not passed on the question. Since that decision the Supreme Court of Colorado in *U. S. F. & G. Co.* v. *McPerson,* 78 Colo. 338, 241 Pac. 728, has held directly contra to the holding in the Stenger case.

We further state that the rule is not in force in the State of Nebraska. While the Supreme Court of the

state has not directly passed upon the question, a former Supreme Court Commission, operating under Section 27-224, Comp. St. Nebr. 1929, did directly pass on the question, in *State ex rel* v. *School District* (Neb. unreported), and held that the right does not exist and is not in force in the State of Nebraska. The opinion is extensively quoted from in the referee's opinion (Rec. p. 27), and also in the opinion of the district court (Rec. p. 44). Section 27-224, Comp. Stat. 1929, under which the commissioners were operating is as follows:

> "In all cases so assigned the Commission shall make full findings of fact, and conclusions of law arising from such facts, and an order or judgment disposing of the case. These findings of fact, conclusions of law and orders or judgments shall then be certified to the Supreme Court and, when the same shall have been approved and adopted by the Supreme Court, they shall be spread upon the records of the court and shall be a final disposition of such cases."

Re P. J. Potter's Sons, (D. C. Ky.) 143 Fed. 407, states as follows:

> "We can hardly doubt that any priority of payment allowed under Section 64b (5), so far as it is therein made to depend upon the 'law of the state' must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment, and it is clearly incumbent upon the person who claims priority to show the existence of such law."

The decisions of the Commission are final judgments of the court and are usually considered as law of the state until such time as expressly overruled by the court itself.

Petitioners cite *Marshall* v. *New York,* 254 U. S. 380, in support of their contention. A municipality was not in-

volved therein, but the court held that the State of New York itself did have such right in conformity with the constitution, and a long line of decisions of the State of New York. It also appears that it was a case of receivership proceedings and not a bankruptcy proceeding.

The decision can also be sustained on the theory that the sovereign right to priority, even in such states where recognized, cannot be asserted after the title to the debtor's property has passed, either by sale, lien, or prior execution. This rule is announced in *City of Denver* v. *Stenger, supra; Southern Railway Co.* v. *Wilder,* (C. C. A. 5) 231 Fed. 933; *Watkins* v. *Alexander,* (C. C. A. 5) 283 Fed. 968; *Hayes* v. *Gibson,* (C. C. A. 3) 279 Fed. 812; *In re Devlin,* 180 Fed. 170, and also in innumerable decisions of the state courts.

It is also stated by this court in *Marshall* v. *New York,* 254 U. S. 380, as follows:

> "The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right."

That the Bankruptcy Act (Sec. 70) U. S. C. Title 11, Sec. 110, itself entirely divests the bankrupt of all interest in his property can no longer be disputed.

Isaacs v. *Hobbs,* 282 U. S. 734.
Straton v. *New,* 283 U. S. 318.
Mueller v. *Nugent,* 184 U. S. 1.
Metcalf v. *Barker,* 187 U. S. 164.

Not only the right of possession, but the title to the bankrupt's property is vested by operation of law in the trustee.

II.

The Relation of the Parties Was That of Debtor and Creditor, and Not One of Trusteeship.

Petitioner's second proposition states that the Circuit Court was in error in holding that no trust relationship existed between the parties; that the court decided an important question of general law in a way untenable and in conflict with the weight of authority. The question does not involve a principle of general law of public importance, as it is very improbable that a similar situation will ever again be presented for determination by the courts.

The statement that the decision on this point is erroneous again necessitates an examination of the merits.

An examination of the opinion (Rec. p. 118) gives ample reason and authority to sustain the finding of the court.

An examination of the original instrument shows it to be entirely inconsistent with a trust relationship.

1. The right to invest the fund is specifically given.
2. The nature of such investment is left indefinite.
3. The bankrupt was obligated to pay interest.
4. The fund was to be returnable upon demand.

If this instrument meant that the bankrupt was holding the money for future investment at the direction of the City, then why the provision for the payment of interest? If not, then could not the bankrupt have invested in any manner that it might see proper to do? Further, if the bankrupt was authorized to invest the money, how then could the fund be returned on demand? As shown by the court's opinion and by the record, the funds were placed

in the general bank account of the Trust Company, where they were left for approximately three and one-half years, and during all of that time the City collected its semi-annual interest from the bankrupt.

The decision of the Circuit Court of Appeals is amply supported by the authorities therein cited, and is also in harmony with the decisions of this court, among which is *Scammon* v. *Kimball,* 92 U. S. 362, where the court uses the following language:

> "Where the agreement is to pay interest the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit."

The rule is recognized by this court in *Manhattan Company* v. *Blake,* 148 U. S. 412, 37 L. ed. 504, and *Blakey* v. *Brinson,* 286 U. S. 258, 76 L. ed. 1089. In the first case the court uses the following language which is very apposite here:

> "The money, when so deposited, became the property of the plaintiff, and was credited by it to the Treasurer of the State in account, and was thereafter drawn by drafts made by the Treasurer of the State and sent to the plaintiff. If such money had been lost or stolen while in the hands of the plaintiff, the plaintiff, and not the state, would have borne the loss. The identical money received by the plaintiff from the Treasurer of the State was not to be returned to the Treasurer or paid to his drawee, or kept distinct from the other funds of the plainitff."

III.

Was a Trust Ex Maleficio Created?

The petitioners' third contention is that a trust ex maleficio resulted from the transaction, and that the decision

of the Circuit Court decided an important question of general law in a way untenable and in conflict with the weight of authority. It is doubtful whether this raises any question of great importance to the country at large, but in any event, the question was correctly decided by the Circuit Court.

At the outset, it will be noted that no constitutional provision or statute of the State of Nebraska, and no ordinance or charter provision of the City of Lincoln is cited which in any manner construes the act of the City in placing the money with the bankrupt, or of the latter in receiving the money, as being illegal or wrongful. Neither is any decision of the Supreme Court of Nebraska cited so holding. The case of *Gamble* v. *Daniel,* 39 Fed. (2d.) 447, is cited. The facts therein are not at all similar to those here involved, and the statement of the court that a trust company is not authorized to accept deposits in the State of Nebraska is merely incidental to its final decision, but in any event does not pass upon a transaction involving a situation similar to that in the instant case. Furthermore, it does not hold that funds received under contracts ultra vires the corporation will be impressed with a trust. Counsel cite no authority whatever for that proposition.

It is not our contention that the transaction constituted a bank deposit. Other means of contracting were legally available to the parties to effect the relation of debtor and creditor. It appears that the certificates were worded to negative the idea of a banking transaction. One of the express powers given trust companies by Section 8-206, Com. St. Nebr. 1929, is "6 * * * *to borrow money.*" The Circuit Court, with ample authority to support the conclusion, sustains this proposition, and holds that the transaction created a relationship of debtor and creditor.

This court follows the general rule that it will be presumed that all persons' acts are legal until the contrary is clearly shown.

On pages 26 and 27 of their brief petitioners contend that the transaction must fall into one of two classes, being briefly, either that of debtor and creditor or that of a trust relation, and if it is the first, then the acts constitute an attempt to create a bank deposit or an attempt by the bankrupt to borrow public funds for private use from the city treasurer, and it is further stated that in either event the transaction would be illegal.

In *Korbley* v. *Springfield Institute for Savings,* 245 U. S. 330, Mr. Justice Clark uses the following language:

> "There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees for the savings banks acted lawfully, within the limits of their powers * * *."

In the absence of any showing to the contrary, it will be presumed that the parties intended to act lawfully, and it necessarily follows that a relation of debtor and creditor was established by the transaction.

As before stated, the record is barren of any evidence establishing any wrongful intent or wrongful act on either the part of the City or the bankrupt. On the contrary, it appears that every precaution was used to make the transaction legal. Again, on page 28 they argue that to construe the acts of the parties as being legal would be unnatural. We believe the contrary is true.

The evidence shows that the money received from the City was placed in the general account where it was commingled with monies which had been received from various classes of investors and other customers to whom

brief specific reference has been made in our statement. If the spirit of the Bankruptcy Act is that equality is equity, why should the City, or more specifically, the bonding company, which for a consideration undertook the responsibility for the risk, be afforded a special advantage over the others who were equally unfortunate. In this connection we call the court's attention to the language of Mr. Chief Justice Taft in *Cunningham* v. *Brown*, 265 U. S. 1, 68 L. ed. 873, as follows:

> "It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit, but its letter, and secured an unlawful preference."

This is true both as to petitioner's contention that an express trust existed and as to their alternative assertion that a trust ex maleficio arose.

IV.

Federal Courts Follow Federal Rules in Tracing Trust Funds.

Having failed to trace the purported trust funds, the petitioners' contention is that the Circuit Court erroneously refused to follow the construction by the Supreme Court of Nebraska of the Nebraska Constitution and Nebraska statutes and the holdings of the Supreme Court of Nebraska that trust funds may be recovered from an insolvent trustee upon proof of augmentation of funds in the hands of the trustee. Counsel then proceed with an attempt to show that by constitutional provision the district courts in Nebraska have chancery jurisdiction; that by statute the common law of England is in force in Nebraska; that in construing the common law of England our court holds that a mere showing of augmentation of

funds is sufficient to give a preference. Cases purporting to sustain the proposition are cited. An examination of the cases cited shows that they merely hold that where a state by statute has reiterated in such statute a principle of common law and such statute has been construed by the highest state court, that then the state court construction of such statute will be followed by the Federal Courts, which in no manner changes the rule of the Federal Courts that in the application of equitable principles and particularly in tracing trust funds, that the Federal Courts will follow their own rules of construction.

This long-established rule has not been changed by the late case of *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, and *Marine National Exchange Bank* v. *Kalt-Zimmers*, ~~292~~ 293 U. S. 540. Both of these cases had to do with the construction of the Negotiable Instruments Act in states where the common law or law merchant had been specifically codified by the states.

The rule established in *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865, and followed in *Mandel* v. *Burton*, C. C. A. 8, 292 Fed. 127, *John Deere Plow Company* v. *McDavid*, C. C. A. 8, 137 Fed. 802, and many other decisions are still in full force and effect.

If the principle contended for by counsel is followed to its inevitable conclusion, then the federal courts would *in all cases* be bound by state court decisions, as nearly all states have adopted the common law, mostly by general statute similar to that of Nebraska, and hence every decision of the state court when some common law right is involved would, according to the argument be a construction of a statute. The fallacy of the argument is apparent.

Even in Nebraska when a question of tracing trust funds of a national bank was involved, our court followed the Federal rule. *Central National Bank of Lincoln* v. *First National Bank of Gering,* 117 Neb. 161, 219 N. W. 894. The court uses the following language:

> "The alleged trust fund has to do with the assets of a national banking institution being administered by a receiver under the laws of Congress. * * * what are assets presents a federal question which necessarily must be determined by the national courts or by the rules approved by them."

If the Nebraska court is bound by the Federal rules of construction in a national bank receivership, being liquidated under the national banking laws, it naturally follows that it would also be bound by the application of Federal rules in the liquidation of any insolvent under the National Bankruptcy Act.

Petitioner's answer to this is that even if this is true, under Section 64b (7) they would be entitled to a priority as existing under a state law. We believe counsel has become confused, as Section 64 has to do with priorities due to *creditors.* If petitioners are entitled to payment of their claim under Section 64b (7) it must be on the theory that they are creditors, and if on the contrary, it is their contention that they are entitled to recover on the trust fund theory, then the petitioners are not creditors, but are simply taking that which belongs to them. Either a debtor and creditor relationship existed or a trust relationship. It must be one, not both.

This rule is recognized by counsel on page 26 of their brief, where they state:

> "However, any relationship created will fall into either of two classes, the first in which title to the

fund delivered passes and the second in which the title to the fund or its proceeds is retained by the transferor."

On this proposition the petitioners have at all times been inconsistent, as seeking priority on the sovereign right theory must necessarily be based on a creditor and debtor relationship.

In *Local Loan Company* v. *Hunt*, 292 U. S. 234, 78 L. ed. 1230, this court had occasion to pass upon the rights of parties under an assignment for wages, like assignments having been upheld by the Illinois courts. The matter arose in the particular case in bankruptcy proceedings, and this court, speaking through Mr. Justice Sutherland, states:

> "To the foregoing array of authority petitioner opposes the decisions of the Supreme Court of Illinois * * *. Undoubtedly, these cases hold, as petitioner asserts, that in Illinois an assignment of future wages creates a lien effective from the date of the assignment, which is not invalidated by the assignor's discharge in bankruptcy. The contention is that even if the general rule be otherwise, this court is bound to follow the Illinois decision, since the question of the existence of a lien depends upon Illinois law.
>
> "We find it unnecessary to consider whether this contention would in a different case find support in Section 34 of the Judiciary Act * * * since we are of the opinion that it is precluded here by the clear and unmistakable policy of the Bankruptcy Act."

In concluding, it is stated:

> "We reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and operation of the Bankruptcy Act."

We believe the instant case is governed by the rule above set forth.

CONCLUSION.

We respectfully submit that petitioners are not entitled to priority in payment of their claim under Section 64b (7) of the Bankruptcy Act, and that the holding of the Circuit Court of Appeals in this regard is correct. We do not believe that a question of grave national importance is involved. It is true that petitioners are asking this court to construe a provision of the Bankruptcy Act which does not appear to have been passed upon by this court since the amendment of 1926, but it is doubtful if this in itself raises a question over which this court will lend its jurisdiction, in view of the fact that the decision of the Circuit Court of Appeals is not in conflict with the decisions of any other circuit. In fact, no case is cited by petitioners of any Circuit Court of Appeals holding contra to the decision in the instant case. In arriving at the conclusion that a question of grave national importance is not involved it is in fact significant that the section of the Act in its application to a municipality has not been passed upon in any other instance so far as we are able to learn.

We do not believe that the holding of the court determining that the relationship of the parties was that of debtor and creditor will raise any question on which this court will grant the writ as the holding is in conformity with nearly the universal holding of all courts, and is not in error.

Respectfully submitted,

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